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**De-banking: Countering Systemic Risks of  
Political Bias in Financial Services**

Before the

**United States House of Representatives  
Committee on the Judiciary  
Select Subcommittee on the Weaponization of the  
Federal Government**

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The Weaponization of the Federal Government

## Introduction

No American should be denied access to basic financial services such as a bank account, debit or credit card, or payment processing because of their religious or political views. Unfortunately, many Americans have good reason to fear that these essential financial services could be abruptly canceled based on the exercise of their First Amendment freedoms.

This Subcommittee has unearthed documents showing that our country's largest banks are working with law enforcement to profile Americans as domestic terror threats if they buy religious texts or firearms or support Donald Trump. A recent hearing also showed that federal agencies are funding tools for the financial sector similar to those social media is using to target misinformation and hate speech.

Unfortunately, this is just the tip of the iceberg. There are numerous examples of religious and conservative organizations or persons being denied deposit accounts or payment processing or having their accounts frozen under suspicious circumstances. A closer look at the financial institutions shows that this cannot be explained away and is not anomalous. Alliance Defending Freedom has represented two of these ministries, Indigenous Advance and the National Committee for Religious Freedom, led by the Honorable Sam Brownback.

Systemic risk of political and religious bias pervades the financial industry, particularly within the largest banks and payment processors. They maintain reputational risk policies that allow them unfettered discretion to punish customers who have, in the institution's view, problematic views. Many also have prohibitions on "hate" speech and "intolerance" that require subjective and value-based judgments on a customer's viewpoint. Both types of policies chill speech and neither would be permissible if the government maintained the policy.

But government regulators have shown a pattern and practice of coercing financial institutions to cancel customers through these policies. Whether it was Operation Choke Point nearly a decade ago or the state of New York in a case currently at the U.S. Supreme Court, both instances show that the government can and will weaponize the financial marketplace against Americans for political benefit.

Other factors aggravate this: banking regulators have expansive authority over banks' day-to-day decisions in almost every aspect of their work; both the government and banks have shown an unsettling willingness to increase data collection practices around customers' speech and religious exercise; and most banking regulation is shrouded in secrecy.

Congress needs to take action. It should support and pass the Fair Access to Banking Act to target these harmful policies. And it should require greater transparency from financial regulators and institutions.

## **I. Viewpoint-based de-banking is on the rise.**

### **A. Bank of America closed the account of Indigenous Advance Ministries.**

Indigenous Advance Ministries, a Tennessee-based nonprofit ministry, partners with on-the-ground groups in Uganda to care for orphaned and at-risk children, educate vulnerable children and prisoners, stop sex trafficking, and provide other essential services, including vocational training and more.<sup>1</sup>

In April 2023, Bank of America abruptly canceled Indigenous Advance's bank account, which the ministry had opened in 2015. Along with canceling its account, Bank of America also canceled the accounts of Servants of Christ, a local Memphis church that periodically gives to Indigenous Advance, and a separate for-profit business called Indigenous Advance Customer Center.<sup>2</sup> All three entities had just 30 days to find and switch over to a new bank.

The bank's abrupt decision created a logistical nightmare for Indigenous Advance Ministries, which had to tell its nine Ugandan employees to wait an extra week to receive a paycheck they depend on for survival. Like many of their countrymen, these Ugandans don't live paycheck to paycheck, but meal to meal. Waiting an extra week for a paycheck in Uganda isn't just inconvenient, it can be the difference between eating and going hungry.

The initial notices provided no specific reason for the cancellations. They only stated that "upon review of your account(s), we have determined you're operating in a business type we have chosen not to service at Bank of America."<sup>3</sup> A later round of letters said, without explanation, that Indigenous Advance "no longer aligns with the bank's risk tolerance."<sup>4</sup> A representative of Servants of Christ and Indigenous Advance repeatedly asked Bank of America employees for a specific reason their accounts had been closed, but the employees gave them the cold shoulder. All the employees would do is read from the previously sent notices.

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<sup>1</sup> Jamie Joseph, *Christian nonprofit claims it was 'debanked' by Bank of America over its religious views*, Fox News (Aug. 25, 2023, 2:15 PM).

<sup>2</sup> Ian M. Giatti, *Bank of America closes accounts tied to Christian outreach ministry*, THE CHRISTIAN POST (Aug. 24, 2023).

<sup>3</sup> Press Release, ALLIANCE DEFENDING FREEDOM, *Bank of America boots charity serving impoverished Ugandans under vague 'risk tolerance' policies*, (Aug. 22, 2023).

<sup>4</sup> *Id.*

## **B. JPMorgan Chase closed the account of the National Committee for Religious Freedom.**

Former Ambassador, Kansas Governor, and U.S. Senator Sam Brownback had a similar experience. He founded the National Committee for Religious Freedom (NCRF)—a nonprofit advocacy group that defends the right of everyone in America to live out their faith freely. In April 2022, NCRF opened a JPMorgan Chase checking account.<sup>5</sup> A few weeks later, the bank shut down the account without explanation.

NCRF only found that out when one of its founders tried to deposit a donation at a local Chase branch on May 19. That’s when NCRF was informed that the account was restricted and marked for closure. All the local branch could share was that the corporate office had closed the account, and that bank employees weren’t permitted to give more information. A week later, NCRF received a letter dated May 6 stating that Chase would close the account and end its relationship on May 9.

On June 8, a corporate representative from Chase called NCRF. The representative said Chase’s internal risk management team determined that the NCRF needed to provide more information and, because the NCRF had failed to do so within 60 days, the account was closed. NCRF informed the representative that the account had not even been opened for 60 days and the NCRF never received a request for additional information.<sup>6</sup> The representative admitted that Chase did not follow its process correctly but said the bank might reinstate the account if NCRF disclosed a list of donors who contributed 10 percent or more of its operating budget and divulged the criteria it uses to decide whom to support politically.<sup>7</sup> NCRF respects its donors’ privacy and was skeptical that the bank made the same demands of other nonprofits, so it declined.

As pressure mounted over the cancellation of the account, Chase changed its story several times. It initially denied asking invasive questions about donors but quickly changed its tune and claimed that it had to ask these questions to comply with federal banking guidelines on money laundering and funding terrorism.<sup>8</sup>

Pressed on the weakness of this rationale, Chase pivoted and claimed that, as a former U.S. senator and ambassador, Mr. Brownback is a “Politically Exposed Person”—a designation that Chase claimed triggers heavier scrutiny before NCRF could open an account. But the relevant guidelines specify that “Politically Exposed

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<sup>5</sup> Sam Brownback and Jeremy Tedesco, *Stop the Troubling Trend of Politically Motivated Debanking*, NEWSWEEK (updated Mar. 17, 2023, 12:25 PM).

<sup>6</sup> National Committee for Religious Freedom, [Notice of Exempt Solicitation](#) submitted at JPMorgan Chase.

<sup>7</sup> *Id.*

<sup>8</sup> Brownback and Tedesco, *supra* note 5.

Persons” do not “include U.S. public officials.”<sup>9</sup> Put simply, the rule Chase cited does not even apply.

Chase delivered its final and weakest rationale at its annual shareholder meeting in 2023. After receiving letters from 19 state attorneys general and 14 state financial officers who were concerned about Chase’s apparent pattern of religious and political discrimination, Chase heard from investment advisor and longtime Chase shareholder David Bahnsen, whose firm has over \$5 billion in assets under management.<sup>10</sup> Mr. Bahnsen told NCRF’s story and asked the bank for answers on its problematic policies and practices on de-banking. Chase CEO Jamie Dimon denied that there was a problem and said that NCRF simply did not fill out all of the required paperwork<sup>11</sup>—an excuse his customer service representative admitted was wrong in the initial phone call nearly a year prior.

### **C. Donor Advised Funds Have Screened ADF for its advocacy.**

Alliance Defending Freedom has become a prime target of activist organizations advocating for viewpoint discrimination in charitable giving. Leading proponents of politicized de-banking, like the discredited and partisan Southern Poverty Law Center, are pressuring philanthropic financial institutions to adopt policies that would prevent account holders from donating to mainstream, religious organizations that SPLC smears as “hate groups.”<sup>12</sup> Some financial institutions have caved to this pressure, including Fidelity Charitable, the country’s largest grantmaker for donor-advised funds, which facilitated 2.3 million grants totaling over \$11.7 billion in donations in 2023.<sup>13</sup>

Since 2019, ADF has received 16 complaints from donors in 13 states who have had their donations to ADF denied or hindered by Fidelity Charitable. Four Fidelity Charitable account holders reported that in 2023 they directed gifts to several conservative nonprofits, including ADF, that were labeled by the SPLC as “hate groups,” and to left-leaning nonprofits that worked on similar issues. The gifts to the conservative groups were held up unless they surrendered their anonymity. Another donor had a similar experience and some of his donation requests were outright

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<sup>9</sup> Brownback and Tedesco, *supra* note 5.

<sup>10</sup> Jathon Sapsford, *JPMorgan Targeted by Republican States Over Accusations of Religious Bias*, THE WALL STREET JOURNAL, (May 13, 2023, 7:59 PM), David Bahnsen, *My Bid to Make JPMorgan Less Woke*, THE WALL STREET JOURNAL (Apr. 16, 2023, 4:06 PM).

<sup>11</sup> Viewpoint Diversity Score, *Instances of Viewpoint-Based De-banking* (last accessed Mar. 4, 2024, 9:01 PM).

<sup>12</sup> See generally The Southern Poverty Law Center and Council on American-Islamic Relations, *Hate-free philanthropy: identifying opportunities and obstacles to safeguard the sector* (2020).

<sup>13</sup> Fidelity Charitable, *2024 Giving Report*, 1 (last accessed Mar. 4, 2024, 9:09 PM).

denied. Yet, all the gifts to the left-leaning organizations passed through with no conditions. This is particularly concerning for Fidelity Charitable because it promises that its grantmaking is cause-neutral and that it will not discriminate against charities for their religious or political views.<sup>14</sup>

Two donors submitted complaints to the consumer protection divisions of Louisiana and Florida.<sup>15</sup> The Florida Attorney General sent a letter to Fidelity Charitable last June after this and advised it that this activity may violate Florida's law prohibiting political and religious discrimination in financial services.<sup>16</sup> Fidelity Charitable appears to have stopped this practice, for now, but many others are still politicizing their services. ADF has also dealt with complaints from donors that Impact Assets, Chicago Community Foundation, and the Community Foundation of Greater Memphis rely on the SPLC to deny grant requests to ADF. They, like other donor-advised funds,<sup>17</sup> use "hate-free" giving policies as cover to discriminate against mainstream conservative and religious groups.

#### **D. Other notable examples of viewpoint-based de-banking.**

Bank of America de-banked Timothy Two Project International, a missions-based ministry, for "operating a business type we have chosen not to service."<sup>18</sup> It also froze the accounts of Christian author, preacher, and podcaster Lance Wallnau, alleging that he was suspected of money laundering but refusing to provide any evidence. The bank eventually unfroze his account but required him to answer a series of invasive questions to do so.<sup>19</sup>

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<sup>14</sup> Katelynn Richardson, [EXCLUSIVE: Major Donor-Advised Fund Manager Allegedly Blocked Anonymous Gifts To Conservative Orgs, Complaint Says](#), DAILY CALLER (Aug. 18, 2023, 12:28 PM).; *see also* Fidelity Charitable, [Grant review and due diligence process](#) ("Fidelity Charitable is a cause-neutral independent public charity .... Fidelity Charitable does not limit grantmaking based on political, religious, or philosophical grounds.") (last accessed Mar. 4, 2024 at 9:24 PM); Stephen Gandel, [Fidelity charitable fund bankrolls 'hate groups,' critics say](#), CBS NEWS (Dec. 10, 2019) (Fidelity spokesperson said "As an independent charity that is cause-neutral, it is not Fidelity Charitable's role to dictate what their values should be. Each of our individual donors has the right to decide which IRS-qualified charities they choose to support.").

<sup>15</sup> *See* Richardson, *supra*, n. 14; Press Release, Office of Attorney General Ashley Moody, [Attorney General Moody demands Fidelity Charitable comply with state law](#) (June 21, 2023).

<sup>16</sup> Press Release, Office of Attorney General Ashley Moody, *supra* note 15.

<sup>17</sup> *See* Amalgamated Foundation, [Hate Is Not Charitable](#) (last accessed Mar. 4, 2024 at 9:37 PM).

<sup>18</sup> Steve Curtis, [Why is Bank of America canceling the accounts of religious organizations?](#), WASHINGTON EXAMINER, (Nov. 12, 2023, 6:00 AM).

<sup>19</sup> Steve Warren, [Bank of America Freezes Ministry Account of Lance Wallnau in Latest Case of Banks Canceling Christians](#), CHRISTIAN BROADCASTING NETWORK (Mar. 13, 2023).

JPMorgan Chase denied payment processing to the Arkansas Family Council because they were designated “high risk,”<sup>20</sup> to Defense of Liberty because hosting Donald Trump Jr. promoted “hate, violence, racial intolerance, terrorism, [and] the financial exploitation of a crime,”<sup>21</sup> and to retired Lieutenant General Michael Flynn for “possible reputational risk to our company.”<sup>22</sup>

Wells Fargo denied payment processing to the pro-life group The Ruth Institute because it was “affiliated with a product/service that promotes hate, violence, harassment and/or abuse.”<sup>23</sup>

Truist closed the account of the Virginia Christian Alliance. The bank informed VCA that “some or all of ... [its] account activity is not consistent with the intended purpose of the account.”<sup>24</sup> Despite repeated attempts by the nonprofit to gain further clarity into the decision, Truist declined to provide its rationale for canceling the account. Notably, the nonprofit had previously been tagged as an “Anti-Muslim” hate group by the Southern Poverty Law Center from 2016 to 2019.

PayPal has also denied service to multiple groups under its policy prohibiting “hate, violence, racial or other forms of intolerance.”<sup>25</sup> They have either frozen or disabled accounts of the parental rights group Moms for Liberty,<sup>26</sup> gender ideology critic Colin Wright,<sup>27</sup> the Free Speech Union and Daily Sceptic for alleged COVID-19 misinformation,<sup>28</sup> and multiple groups reporting critically on the Russia-Ukraine

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<sup>20</sup> Jerry Cox, *Chase Bank Cancels National Committee for Religious Freedom’s Account Just Like it Canceled Family Council’s*, Family Council (Oct. 19, 2022).

<sup>21</sup> Aila, Slisco, *Largest U.S. Bank Cuts Ties to Conservative Group, Canceling Donald Trump Jr. Event*, NEWSWEEK (Nov. 18, 2021, last updated Nov. 19, 2021, 4:32 PM).

<sup>22</sup> Luke Gentile, *Chase Bank apologizes for Michael Flynn credit card cancellation letter sent in ‘error’*, WASHINGTON EXAMINER (Sept. 1, 2021, 11:35 PM),.

<sup>23</sup> Tyler O’Neil, *Another Scalp? Donation Processing Company Drops ‘Hate Group’ Christian Nonprofit Attacked by the Southern Poverty Law Center*, PJ MEDIA (Sep. 5, 2017, 8:07 AM).

<sup>24</sup> Viewpoint Diversity Score, *Instances of Viewpoint-Based De-banking*.

<sup>25</sup> Viewpoint Diversity Score, *PayPal Holdings* (last accessed Mar. 4, 2024 at 9:57 PM).

<sup>26</sup> Lydia Nusbaum, *PayPal Unfreezes Moms for Liberty Funds After DeSantis Announces Crackdown on ‘Woke’ Banking*, FLORIDA’S VOICE (Aug. 1, 2022, 4:36 PM).

<sup>27</sup> Colin Wright, *How trans activist trolls got me deplatformed by PayPal and Etsy*, NEW YORK POST (Oct. 8, 2022, 9:00 AM).

<sup>28</sup> Louisa Clarence-Smith, *PayPal shuts down accounts of Free Speech Union*, THE TELEGRAPH (Sept. 20, 2022, 9:27 PM).

conflict.<sup>29</sup> Last year PayPal also tried to ban and fine users for “misinformation,” but quickly rescinded the policy in response to public backlash.<sup>30</sup>

In addition to some of the PayPal examples, notable international examples include Nigel Farage, Core Issues Trust, and the Canadian Truckers. Farage, the former leader of Brexit, was de-banked by NatWest, one of the United Kingdom’s largest banks. Internal documents from the bank confirmed that it canceled him because his political views—including on gender identity, COVID-19 policy, and illegal immigration—were not consistent with the bank’s “position as an inclusive organisation.”<sup>31</sup> Similarly, Barclays closed the accounts of Core Issues Trust and the International Federation for Therapeutic and Counseling Choice without explanation and amid sustained pressure from far-left activist groups.<sup>32</sup> And government records in Canada indicate that 837 individuals have been de-banked over the last five years. That number includes 267 bank accounts and 170 Bitcoin wallets that were closed because of Prime Minister Justin Trudeau’s crackdown on the Freedom Convoy, which peacefully protested government COVID-19 policy.<sup>33</sup>

#### **E. De-banking is a bipartisan concern.**

Several U.S. House and Senate members recently sent letters to Citibank, Wells Fargo, Bank of America, and J.P. Morgan Chase, raising concerns about “discriminatory account closures and restrictions.”<sup>34</sup> The letters cited reports indicating that “Muslim and Arab, Middle Eastern, and South Asian Americans may be considered ‘high risk’ when sending payments or remittances abroad or donating to charities or religious institutions.”<sup>35</sup> It also highlighted that the Consumer Financial Protection Bureau recently ordered Citigroup to pay \$25.9 million in fines to redress its targeting of Armenian-American credit card applicants.

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<sup>29</sup> David Z. Morris, *Deplatformed by PayPal, Antiwar Journalists Speak Out*, COIN DESK (May 23, 2022, 10:30 AM)..

<sup>30</sup> Ben Zeisloft, *New PayPal Policy Lets Company Pull \$2,500 From Users’ Accounts If They Promote ‘Misinformation’*, THE DAILY WIRE (Oct. 7, 2022).

<sup>31</sup> Coutts’ Dossier on Nigel Farage, *Explainer, Key points from Coutts’ dossier on Nigel Farage*, SKY NEWS (July 28, 2023).

<sup>32</sup> Jon Brown, *Barclays settles after shuttering Christian charity’s account following alleged ‘conversion therapy’ promotion*, FOX BUSINESS (June 29, 2023, 2:30 PM).

<sup>33</sup> Christina Maas, *Hundreds of Canadians Have Been Debanked In The Last Five Years, Report Shows*, RECLAIM THE NET (Oct. 8, 2023).

<sup>34</sup> Press Release, Office of Elizabeth Warren, *Warren, Omar, Lawmakers Seek Information from Big Banks on Account Closure Practices that Discriminate Against Muslim Americans* (Feb. 22, 2024); Letter to Jamie Dimon from Elizabeth Warren and other members of Congress (Feb. 22, 2024).

<sup>35</sup> *Id.*



The New York Times recently investigated the rise in bank account closures.<sup>36</sup> It examined 500 cases of account cancellations and interviewed over a dozen bank industry leaders. In a follow-up article titled “The Way Big Banks Shut Down Customer Accounts is Callous. Let’s Fix It,” the Times observed how “account closings often come without warning” with “no recourse, appeal or explanation from the bank” and “[s]ometimes you find out you have lost banking privileges when you’re buying food at the grocery store and your credit and debit cards no longer work.”<sup>37</sup> The Times went on to say:

But losing your bank account isn’t just inconvenient. It’s scary. If you’re a small business, it disrupts your payroll and can damage your reputation in the community. Given no explanation, you wonder if you’ve been blacklisted or put on some kind of government watch list.<sup>38</sup>

Many Democratic Senators have also supported legislation to prohibit discrimination in banking. In 2022, Chairman of the Senate Committee on Banking Sherrod Brown, along with 18 other Democratic Senators, introduced the Fair Access to Financial Services Act to prohibit banks from discriminating against customers for their religion and other protected statuses.<sup>39</sup> The NAACP and National Urban League were notable sponsors.<sup>40</sup>

In 2017 and shortly after Operation Chokepoint, which is discussed below, the U.S. House also passed the Financial Institution Customer Protection Act with an overwhelming 395-2 vote. The bill stated that a federal banking agency “may not formally or informally request or order” a bank to terminate a relationship with a customer unless “the agency has a valid reason for such request or order, and such reason is not based solely on reputation risk.”<sup>41</sup>

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<sup>36</sup> Ron Lieber and Tara Siegel Bernard, *Why Banks Are Suddenly Closing Down Customer Accounts*, THE NEW YORK TIMES (Nov. 5, 2023).

<sup>37</sup> Ron Lieber, *The Way Big Banks Shut Down Customer Accounts Is Callous. Let’s Fix It*, THE NEW YORK TIMES (Dec. 30, 2023).

<sup>38</sup> *Id.*

<sup>39</sup> Press Release, Office of Sherrod Brown, *Brown, Colleagues Reinroduce Legislation to Fight Discrimination from Financial Institutions* (July 26, 2022).

<sup>40</sup> U.S. Committee on Banking, Housing, and Urban Affairs, *The Fair Access to Financial Services Act One Pager*.

<sup>41</sup> Financial Institution Customer Protection Act of 2017, H.R. 2706 115th Cong. (2017).

## **II. The rise in politicized de-banking points to systemic censorship risks in the financial industry.**

The myriad of account cancellations and payment denials outlined above are not isolated occurrences, but instead expose the systemic censorship risks that pervade the financial industry. While many factors contribute to the financial censorship phenomenon, a significant root cause is the vague and subjective terms of service that have been adopted by most financial institutions.

ADF's Viewpoint Diversity Score Business Index measures the biggest bank and tech companies' respect for free speech and religious freedom across 43 benchmarks that span many aspects of the company's operation, including terms of service.<sup>42</sup> The 2023 Index found that over half of scored financial service companies have terms of service or other policies that easily allow them to restrict or deny service based on a customer's speech or religion. These mainly take the form of "reputational risk" policies or bans on hate speech or intolerance. Regulators and financial institutions may also leverage other policies, namely anti-terrorism and money laundering policies to get at lawful businesses, often in conjunction with reputational risk concerns. But reputational risk and hate speech policies present unique dangers to free speech because they are inherently at odds with free speech and religious liberty.

### **A. Financial institutions should, and financial regulators must, respect free speech and religious freedom.**

The First Amendment is a helpful guide to understand the threat that vague and subjective policies in the banking and financial services industries pose to free speech and religious freedom for at least three reasons.

First, regulators have a history of discriminating against disfavored views and industries through reputational risk—whether for invidious reasons or not.<sup>43</sup> Federal regulators have pervasive and expansive authority over financial institutions, particularly banks,<sup>44</sup> so this is an inherent and ever-present danger. In these cases, First Amendment protections directly apply.

Second, large national banks act as gatekeepers over essential financial services that people need to conduct business and live their lives—to have basic economic freedom. Even absent government action, the largest banks can cut off services at a whim with no explanation or warning. This poses at least as great a threat to free speech and religious freedom as government censorship. The five

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<sup>42</sup> Viewpoint Diversity Score, *2023 Business Index*.

<sup>43</sup> Sec. III.B., *infra*.

<sup>44</sup> Amici Br. Of Fin. & Bus. L. Scholars at 3-4, *Nat'l Rifle Ass'n v. Vullo*, No. 22-842 (Mar. 21, 2023)

largest banks, for example, hold over 50% of all deposits in the country.<sup>45</sup> That the government is propping up many of these institutions with bailouts, subsidies, and an anti-competitive chartering system only elevates the need to ensure viewpoint neutrality.<sup>46</sup>

Third, because of the lack of transparency in banking, it is extremely difficult to determine if a cancellation occurred because of government coercion or private action. This, combined with regulators' pervasive authority, blurs the lines between private and public action in the banking space. Anytime a bank cancels an account for what appears to be viewpoint-based reasons, suspicion of government action and elevated scrutiny is warranted.

### **B. Reputational risk policies invite heckler's vetoes.**

"Reputational risk" policies epitomize concerns about unbridled discretion. Every bank has "reputational risk" policies because banking regulators focus on it as part of a "risk-focused" regulatory approach.<sup>47</sup> Reputational risk covers not only the bank's own conduct, but has been extended in recent years to cover customers' conduct, on the theory that doing business with controversial customers may harm the bank's own reputation.<sup>48</sup> It is readily apparent how such vague policy language can be used to deny service to customers with certain views.

The government cannot discriminate against speech based on its content. But when the government goes further and "targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.... Viewpoint discrimination is thus an egregious form of content discrimination." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

The government must not only refrain from direct viewpoint discrimination, but its policies that regulate speech must also include "narrow, objective, and definite standards" to prevent viewpoint discrimination in the first place. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151. This is because officials with unfettered discretion "may decide who may speak and who may not speak based upon the content

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<sup>45</sup> Adam McCann, *Bank Market Share by Deposits and Assets*, WALLETHUB (Feb. 26, 2024).

<sup>46</sup> Brian Knight and Trace Mitchell, *Private Policies and Public Power: When Banks Act as Regulators Within a Regime of Privilege*, 13 NYU J. L. & Lib. 66, 73 (2020) ("Banks operate in a highly distorted market. This distortion takes many forms, including barriers to entry, direct support from the government in the form of certain services, and, for some banks, government rescue from failure."); Banking Strategist, *De Novo Bank Chartering Trends* (since 2008, there has been a sharp downward trend in new banks, that "for every 100 banks that merged, liquidated or failed, less than 4 new banks have been formed," and "[t]his trend is probably irreversible") (last accessed Mar. 4, 2024).

<sup>47</sup> Julie Hill, *Regulating Bank Reputation Risk*, 54 Ga. L. Rev. 523, 544-46 (2020).

<sup>48</sup> *Id.* at 552.

of the speech or the viewpoint of the speaker.” *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 763-64 (1988). Another danger is that vague standards make “*post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria ... far too easy.” *Id.* at 758.

Under this rule, the U.S. Supreme Court has invalidated policies that restrict speech based on “public welfare, peace, safety, health, decency, good order, morals or convenience,” *Shuttlesworth*, 394 U.S. at 149, a third party’s “reaction to speech,” *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992), or “such other terms and conditions deemed necessary and reasonable.” *City of Lakewood*, 486 U.S. at 769.

“Reputational risk” policies present these same concerns. It is all too easy for a regulator or bank to say that someone’s political advocacy or religious views present a “reputational risk” to the bank because of how others perceive them. These policies enshrine a heckler’s veto. As explained below, they are also attractive targets for regulators who want to punish certain views. And as the de-banking stories above show, they also provide ample cover for banks to shroud viewpoint discrimination and avoid transparency.

### **C. Bans on “hate” and “intolerance” expressly target certain views.**

Banning speech that is hateful, intolerant, or otherwise offensive is just as problematic as a reputational risk policy and is equally open to abuse. Over a third of banks and other financial institutions scored on the Viewpoint Diversity Score Business Index have prohibitions on offensive speech. Troublingly, this includes some of the largest payment processors like PayPal and Visa, 6 of the top 10 largest banks, and each of the top 3.

The First Amendment broadly protects the right to speak according to one’s conscience. And in the public square, free speech protects open discussion in the marketplace of ideas. As Justice Holmes famously said, “the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . That at any rate is the theory of our Constitution.” *Abrams v. United States*, 250 U.S. 616, 630 (1919). We cannot advance truth without disagreeing, and we cannot disagree without risking offense. We thus have “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.” *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

While many policies aim to prohibit fighting words, obscenity, or other types of conduct that are not protected speech, the First Amendment defines these categories narrowly. On the other hand, banning speech just because someone “finds [it] offensive” is the “essence of viewpoint discrimination,” which is “poison to a free

society.” *Iancu v. Brunetti*, 588 U.S. ---, 139 S. Ct. 2294, 2299, 2303 (2019). Courts have struck down all kinds of similar terms, including threats, insults, epithets, ridicule, and personal attacks, *Roberts v. Haragan*, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004), stigmatize or victimize, *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 853 (E.D. Mich. 1989), derogatory comments, *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 670 (7th Cir. 2008), words that denigrate, belittle, or offend the listener, *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001), and acts of intolerance that demonstrate malicious intent toward others, *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 370 (M.D. Pa. 2003).

Other policies apply these terms to prohibit things like “racial intolerance” or “bigotry” based on one’s protected characteristics. But these are just as problematic. In *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992), the Supreme Court struck down a town ordinance prohibiting any speech that “arouse[d] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.” The Court explained that instead of protecting against discrimination, this just created “special prohibitions on those speakers who express views on disfavored subjects” singled out by the ordinance. *Id.* At 391.

Many problematic policies in the financial industry mirror the above policies that courts have struck down:

- **Bank of America:** prohibits payments for “[i]llegal or brand damaging activities includ[ing], but ... not limited to ... [m]aterials that promote intolerance ... or hate.”<sup>49</sup>
- **Capital One:** prohibits payments “for communications or activities that...promote hate..., [or] racial intolerance, ...[or] include any language or images that are bigoted, hateful, racially offensive..., indecent, or discourteous...”<sup>50</sup>
- **PayPal:** prohibits use of its services for “activities that: ... relate to transactions involving ... the promotion of hate, violence, racial or other forms of intolerance that is discriminatory.”<sup>51</sup> In October 2022, PayPal revised its acceptable use policy – granting itself unilateral power to fine users who promote so-called “misinformation” up to \$2,500 per offense. Following public backlash, the company claimed to backtrack on its controversial policy changes. While it removed “misinformation,” the policy

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<sup>49</sup> Viewpoint Diversity Score, *Bank of America* (last accessed Mar. 4, 2024 at 11:34 PM).

<sup>50</sup> Viewpoint Diversity Score, *Capital One Financial*(last accessed Mar. 4, 2024 at 11:35 PM).

<sup>51</sup> Viewpoint Diversity Score, *PayPal Holdings* (last accessed Mar. 4, 2024 at 11:36 PM).

retains the equally arbitrary and subjective terms “hate” and “intolerance,” leaving PayPal’s customers open to viewpoint-based discrimination.<sup>52</sup>

These terms are inherently malleable and are impossible to apply in a fair and objective manner. Instead, they condition one’s ability to speak on the whim of whatever employee or official is enforcing the policy. As First Amendment scholar Eugene Volokh has noted, these kinds of policies, when held by private entities, are attractive targets for activists and government officials who want to engage in censorship.<sup>53</sup> And when some views start being suppressed, others want in on the action. But since there is no principled way to limit the definition of terms like “hate,” the concept only expands, a phenomenon known as “censorship creep.”<sup>54</sup>

### **III. Government regulators and the censorship industrial complex are making it significantly easier to weaponize financial institutions.**

#### **A. Government coercion is easy in the financial sector because regulators have pervasive authority over financial institutions.**

Financial institutions are one of the most highly regulated industries in the country. There are over 115 state and federal agencies that regulate at least some aspect of financial services.<sup>55</sup> Many federal agencies, like the Office of the Comptroller of the Currency, Federal Reserve Board, Federal Deposit Insurance Corporation, National Credit Union Administration, and Consumer Financial Protection Bureau, have broad purview over banks or other financial institutions.<sup>56</sup>

These regulators have ongoing, daily supervision to enforce broad and malleable requirements that prohibit things like “unsafe or unsound” practices or require banks to consider the aforementioned “reputational risk.”<sup>57</sup> Regulators can also subject financial institutions to more robust enforcement, including investigations, cease and desist orders, consent decrees, and director and officer bars.<sup>58</sup>

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<sup>52</sup> Greg Wilson, *PayPal Reverses Plan To Fine Users \$2,500 For ‘Misinformation’ After Daily Wire Report*, DAILY WIRE (Oct. 8, 2022).

<sup>53</sup> Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. Free Speech L. 377, 395 (2021).

<sup>54</sup> *Id.*

<sup>55</sup> Elizabeth F. Brown, *The Continuum of Financial Products*, 25 Stanford Journal of Law, Business & Finance 183, 197 (Spring 2020).

<sup>56</sup> *Id.* at 197-200.

<sup>57</sup> Hill, 54 Ga. L. Rev. at 557-60.

<sup>58</sup> Amici Br. Of Fin. & Bus. L. Scholars at 10-13, *Nat’l Rifle Ass’n v. Vullo*, No. 22-842 (Mar. 21, 2023).

That regulators can enforce these requirements through confidential communications, recommendations, and exams only elevates their coercive power over financial institutions.<sup>59</sup> “Supervision happens behind closed doors. It relies upon secrecy and involves a system of discretionary actions by supervisory staff.”<sup>60</sup> If an institution fails to satisfy a regulator in one area of regulation, that can easily sour the relationship and lead to greater regulatory burdens on other issues. These informal enforcement mechanisms allow regulators to “make life miserable” for a financial institution “in all sorts of ways.”<sup>61</sup> In short, financial institutions have overwhelming incentives to keep their regulators happy.

As others have noted, the level of control regulators have “can make them look more like co-managers of the firm than outside regulators.”<sup>62</sup> For example, federally chartered banks must seek OCC approval before opening or moving a location.<sup>63</sup> The FDIC has used aggressive tactics to coerce banks to stop offering tax refund anticipation loans.<sup>64</sup> And perhaps most troublingly, federal and state regulators have a history of discouraging business to certain groups under “reputational risk” policies.

### **B. Government regulators can and have discriminated against businesses for their views under the guise of “reputational risk.”**

Unfortunately, recent history shows that government regulators can and do leverage financial services to discriminate against lawful businesses. In Operation Choke Point, regulators under President Obama targeted disfavored industries “without any evidence that [they] had done anything illegal, no due process to the adversely affected firms, and indeed, a complete lack of transparency, including a reluctance to even admit the existence of the initiative and its reach.”<sup>65</sup> Even more recently, former New York Governor Cuomo and his financial regulators openly advocated for banks and other insurance firms in the state to stop doing business with the National Rifle Association because it was “an extremist organization.” The

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<sup>59</sup> Hill, 54 Ga. L. Rev. at 569.

<sup>60</sup> *Guidance, Supervisory Expectations, and the Rule of Law: How Do the Banking Agencies Regulate and Supervise Institutions: Hearing Before the S. Comm. On Banking, Housing, and Urban Affairs*, 116th Cong. 36 (2019) (statement of Margaret E. Tahyar, Partner, Davis Polk and Wardwell LLP).

<sup>61</sup> Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 Yale J. Reg. 165, 195 (2019).

<sup>62</sup> Amici Br. Of Fin. & Bus. L. Scholars at 4, *Nat’l Rifle Ass’n v. Vullo*, No. 22-842 (Mar. 21, 2023).

<sup>63</sup> 12 C.F.R. § 5.30-5.31.

<sup>64</sup> Hill, 54 Ga. L. Rev. at 576-77.

<sup>65</sup> Todd Zywicki, *Rent-Seeking, Crony Capitalism, and the Crony Constitution*, 23 S. Ct. Econ. Rev. 77, 91 (2015).

U.S. Supreme Court will decide this term in *National Rifle Association v. Vullo*, No. 22-842, whether these actions violated the NRA’s First Amendment rights.

## 1. Operation Choke Point

In the now infamous Operation Choke Point, President Obama’s DOJ and FDIC spearheaded a multi-agency initiative to target legal industries like firearms dealers, tobacco sellers, dating services, coin dealers, and payday lenders.<sup>66</sup> After a group of payday lenders sued the FDIC, litigation filings and subsequent federal oversight offered a rare look into the world of financial regulation. The FDIC expanded “reputational risk” to include “any negative publicity involving the third party.”<sup>67</sup> It then worked in conjunction with the DOJ and other agencies to pressure financial institutions to deny service to disfavored industries.

The DOJ issued over 60 subpoenas; the FDIC and OCC issued related guidance on the reputation risk presented by payment processing for these entities; and the FDIC listed the above businesses as “high-risk businesses,” all with the intent to cut off banking access to these industries.<sup>68</sup> The FDIC “provided no explanation or warrant for the designation of particular merchants as ‘high-risk.’” Furthermore, there is no explanation for the implicit equation of legitimate activities such as *coin dealers* and *firearm sales* with such patently illegal or offensive activities as Ponzi schemes, racist materials, and drug paraphernalia.<sup>69</sup> Other documents showed that the FDIC pushed reputational risk because “legal [compliance] was a major obstacle” to pushing any sort of formal enforcement.<sup>70</sup> That is, the businesses were not breaking the law, so the FDIC had to push them out using the ever malleable concept of reputational risk. Reports later surfaced that financial institutions were closing the accounts of many of these businesses, and even churches.<sup>71</sup>

The FDIC eventually settled the lawsuit. As part of the settlement, it admitted that “certain employees acted in a manner inconsistent with FDIC policies” through

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<sup>66</sup> John Berlau, *'Choke Point' Is Frightening Precedent for Bank Regulatory Abuse*, FORBES (October 31, 2018, 2:55 PM).

<sup>67</sup> *Id.*; See Hill, 54 Ga. L. Rev. at 575 & n. 297.

<sup>68</sup> Hill, 54 Ga. L. Rev. at 573.

<sup>69</sup> H. Comm. On Oversight & Gov’t Reform, 113th Cong., *The Department of Justice’s “Operation Choke Point”: Illegally Choking Off Legitimate Businesses?*, Staff Report at 8 (May 29, 2014).

<sup>70</sup> Hill, 54 Ga. L. Rev. at 576.

<sup>71</sup> Sheila Tendy, Opinion, *De-Risking Threatens Religious Access to Banking Services*, AM. BANKER (Jan. 27, 2015, 12:00 PM). (bank closed the account of a church with cash donations and some cross-border transactions because the church “‘just didn’t fit with the model of the kind of entity’ that the bank wanted to do business with”).



“[r]egulatory threats, undue pressure, coercion, and intimidation”<sup>72</sup> and added guidance stating that a financial institution should not terminate an account “based solely on reputation risk to the institution.”<sup>73</sup>

## 2. *NRA v. Vullo*

There are even instances where government officials publicly pressured financial institutions to target certain disfavored industries for discrimination.

In *NRA v. Vullo*, the then-head of New York’s Department of Financial Services, Maria Vullo, issued formal guidance letters urging all banks and insurance companies in New York to “continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations.”<sup>74</sup> Vullo emphasized “the social backlash against the NRA and similar organizations that promote guns” and favorably cited financial institutions that had “severed their ties with the NRA.”<sup>75</sup>

Later that day, Vullo and Governor Cuomo issued a press release saying “DFS urges all insurance companies and banks doing business in New York to join the companies that have already discontinued their arrangements with the NRA.”<sup>76</sup> Cuomo made it clear on social media that he was targeting the NRA for its political views: “The NRA is an extremist organization. I urge companies in New York to revisit any ties they have to the NRA and consider their reputations, and responsibility to the public.”<sup>77</sup>

Soon after, DFS announced that it had concluded its investigations into two insurance carriers that had served the NRA, that it had imposed multi-million dollar fines on both companies, and that it obtained consent orders prohibiting those companies from offering “any affinity-type insurance program” with the NRA.<sup>78</sup> To avoid the DFS’s ire, another insurer working with the NRA directed all its underwriters to terminate any insurance associated with the NRA.<sup>79</sup>

The Second Circuit held that New York’s actions fell “short of plausibly alleging unconstitutional threats or coercion.” *NRA v. Vullo*, 49 F.4th 700, 718 (2d

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<sup>72</sup> [FDIC Letter to David H. Thompson](#) at 4-5 (May 22, 2019).

<sup>73</sup> [Statement of the FDIC](#) at 2.

<sup>74</sup> Pet’rs Opening Br. at 9, *Nat’l Rifle Assoc. v. Vullo*, No. 22-842 (Jan. 9, 2024).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 10.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 11.

Cir. 2022). But the NRA successfully petitioned the Supreme Court to hear the case, which it will decide this term.

The cooperation between government regulators and financial institutions in these instances is alarming. But what we do not know may be even worse. Government regulators can all too easily wield their outsized power over financial institutions to pressure them to weaponize reputational risk policies, hate speech policies, and others against disfavored views—all with virtually no public accountability. Financial institutions in turn can hide behind that same shield to discriminate without ever explaining it to the customer—regardless of whether the action was prompted by government pressure. And growing evidence of the two collaborating to censor views they deem “misinformation” or profile religious, conservative, and gun-owning Americans as domestic terrorists shows that the danger is only likely to get worse.

### **C. The censorship industrial complex will only accelerate the risk of de-banking.**

This Committee and the Select Committee recently brought to light the alarming censorship industrial complex driving social media censorship. Many want to use this same playbook for financial discrimination.<sup>80</sup> As damaging as online censorship is to public discourse, the threat that you could lose your bank account or other essential financial services because of your views is even more likely to chill free speech and religious freedom.

No one should live in fear that their bank might be working with law enforcement to flag them as a “domestic threat” based on their political or religious views. Yet this Committee and the Select Committee have revealed that the Financial Crimes Enforcement Network (FinCen) “urged large financial institutions to comb through the private transactions of their customers for suspicious charges on the basis of protected religious and political expression.”<sup>81</sup> FinCen apparently urged banks to search for “the purchase of books (including religious texts)” and terms like “Cabela’s” and “Dick’s Sporting Goods” to identify possible extremists.<sup>82</sup> Another document the FBI shared with financial institutions apparently characterized “‘increased socio-political pressures’ surrounding ‘firearm legislation, the easing of

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<sup>80</sup> Comm. On the Judiciary and Select Subcomm. On the Weaponization of the Federal Gov’t, 115th Cong., *The Weaponization of The National Science Foundation: How NSF Is Funding The Development Of Automated Tools To Censor Online Speech “At Scale” And Trying To Cover Up Its Actions*, Interim Staff Rep’t at 8 (Feb. 5, 2024) (“The censorship of speech has extended into financial surveillance and de-banking.”).

<sup>81</sup> [Comm. On the Judiciary Letter to Noah Bishoff](#), (Jan. 17, 2024).

<sup>82</sup> *Id.*

immigration restrictions’ as well as ‘discontent with renewed measures to mitigate the spread of COVID-19 ...’ as indicators of domestic violent extremism.<sup>83</sup>

This Committee and the Select Committee have also reported that National Science Foundation grants are fueling the development of “artificial intelligence (AI)-powered censorship and propaganda tools that can be used by governments and Big Tech to shape public opinion by restricting certain viewpoints or promoting others.”<sup>84</sup> Alarming, some of these tools are being developed to help financial institutions reduce risk posed by misinformation. For example, NSF granted over \$1 million to Automated Controversy Detection, Inc. to develop AI programs that can “automatically detect controversy and disinformation, providing a means for financial institutions to reduce risk exposure’ amid the increase of ‘public attention and political concern’ being paid to disinformation.”<sup>85</sup> Detecting “controversy” and “disinformation” are inherently subjective endeavors that will inevitably result in the censorship of protected expression or, in this case, the denial of essential financial services to those who spread purported “dis/mis-information” or whose views are deemed too “controversial.”

Relatedly, major banks have attended CISA Cybersecurity Advisory Committee meetings concerning misinformation and disinformation. For example, JPMorgan Chase attended one such meeting on March 21, 2022.<sup>86</sup> CISA considers “financial services” to be “critical infrastructure” that is put at risk by “the spread of false and misleading information.”<sup>87</sup> Media reports indicate that topics at CISA meetings “have ranged from the scale and scope of government intervention in online discourse to the mechanics of streamlining takedown requests for false or intentionally misleading information.”<sup>88</sup>

Existing reputational risk and hate policies at financial institutions pose a significant risk to American’s civil liberties on their own. The revelation that the censorship industrial complex is expanding to include financial institutions—with federal agencies monitoring religious persons and gun owners as potential terrorists

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<sup>83</sup> [Comm. On the Judiciary Letter to the Hon. Christopher Wray](#), (Jan. 17, 2024).

<sup>84</sup> *See* Interim Staff Report, *supra* n.80 at 1.

<sup>85</sup> Samuel Mangold-Lenett, *U.S. Government Gave \$1 Million To AI Startup That Helped Blacklist Companies Spreading ‘Disinformation’*, THE FEDERALIST (Nov. 13, 2023).

<sup>86</sup> Ken Klippenstein & Lee Fang, *Truth Cops: Leaked Documents Outline DHS’s Plans to Police Disinformation*, THE INTERCEPT (Oct. 31, 2022, 5:00 AM).

<sup>87</sup> Report To The Cisa Director, *Protecting Critical Infrastructure from Misinformation and Disinformation* (June 22, 2022).

<sup>88</sup> Klippenstein & Fang, *Truth Cops*.

and funding AI tools designed to deny financial services to those guilty of spreading “misinformation” and “controversy” online—pours fuel on the censorship fire.

**D. The lack of transparency inherent in banking regulation enables financial institutions to hide viewpoint discrimination.**

Exacerbating the concerning patterns of de-banking, vague policies across the financial sector, abuse of reputational risk by regulators, and pressure by activists to de-bank disfavored entities and individuals, financial institutions also suffer from a chronic lack of transparency in at least three key areas:

1. Details about how standards for reputational risk policies and prohibitions on “hate,” “intolerance,” “misinformation,” and similar prohibitions are determined, interpreted, and applied.
2. Mechanisms for customers to request and obtain information about why their accounts or services were discontinued.
3. Information about the stakeholders consulted when making decisions about terminating or restricting service.

This lack of transparency is deeply rooted in the banking regulatory system. Professor Julie Hill explained that banking regulators’ informal enforcement actions take place through an “entirely confidential” examination process.<sup>89</sup> During this process, the regulators identify “matters requiring attention,” “supervisory recommendations,” or “examiner’s findings” that banks know they “ignore ... at their peril.”<sup>90</sup> In the informal context, mere “raised eyebrows” can “sometimes be ‘equally effective’ as formal enforcement actions.”<sup>91</sup> This informal supervision occurs “behind closed doors,” “relies upon secrecy,” and “involves a system of discretionary actions by supervisory staff.”<sup>92</sup> Even formal enforcement actions, which are often public, can be kept confidential if “revealing the action ‘would be contrary to the public interest.’”<sup>93</sup>

Much bank supervision is also protected from disclosure by the concept of confidential supervisory information (CSI), a term that broadly includes any information relating to an examination, inspection, or other visitation of a financial institution by a regulator.<sup>94</sup> In general, financial institutions cannot disclose any CSI documents, including disclosures to customers. But the term is defined differently by

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<sup>89</sup> Hill, 54 Ga. L. Rev at 569.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 570.

<sup>92</sup> Statement of Margaret E. Tahyar, Partner, *supra* n.60.

<sup>93</sup> Hill, 54 Ga. L. Rev. at 569.

<sup>94</sup> Clifford S. Stanford, *Toward a Coherent Framework for the Treatment of Confidential Supervisory Information*, 22 N.C. Banking Inst. 41, 46 (2018); see also James E. Kelly, *Transparency and Bank Supervision*, 73 Albany L.R. 421, 439-41 (2010) (discussing bank examiner’s privilege which protects an examiner’s opinions, recommendations, and other deliberative aspects of the examination process).

each federal regulator, and its scope is notoriously opaque.<sup>95</sup> Combine this with banks that want to keep their regulators happy, and the scope of what banks consider to be CSI balloons.

The way banks treat customers when they de-bank them bears this out. For example, Chase repeatedly told NCRF that it could not disclose why it had closed the account. When the story went public several months later, Chase suddenly cited concerns about money laundering and politically exposed persons, a common lever of reputational risk during Operation Choke Point and today. Bank of America similarly told Indigenous Advance that it could not elaborate on why it was a bad “business type” or had too high of a “risk profile”—until Daily Mail was about to publish a story. This shows how malleable CSI, and similar confidentiality provisions, are for banks.

#### **IV. Solutions to Protect Americans from De-banking**

Systemic censorship risk and a chronic lack of transparency exist throughout the financial industries’ customer-facing policies. This one-two punch will require not only a spotlight of accountability, but significant reforms to reach deeper to the root cause.

Congress should pass the Fair Access to Banking Act, H.R. 2743 and S. 293. That Act would require the largest banks to deny service based only upon “quantitative, impartial risk-based standards established in advance by the covered bank.”<sup>96</sup> It also prohibits those banks from using reputational risk as the sole reason for denying service. This would pare back reputational risk policies, which are “less quantifiable’ than credit or market risk.”<sup>97</sup> And it would prohibit any “subjective or category-based evaluations to deny certain persons access to financial services,” whether made under reputation risk, hate speech, or other types of policies, as the OCC stated when enacting (a later retracted) Fair Access Rule in 2021.<sup>98</sup>

Congress should amend the Act to prohibit the use of “third-party” reputational risk policies that expressly allow banks—or their regulators—to factor the negative publicity a customer receives as a component of reputational risk to the bank. From a First Amendment perspective, this is perhaps the most problematic aspect of these regulatory and bank policies.

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<sup>95</sup> *Id.* at 50-51.

<sup>96</sup> H.R. 2743 Sec. 8(b)(1)(B).

<sup>97</sup> Hill, 54 Ga. L.R. at 547 (quoting Office of the Comptroller of the Currency, Comptroller’s Handbook: Bank Supervision and Examination Process: Large Bank Supervision, Appendix A: Risk Assessment System (Dec. 1995) (strategic and reputation risk “affect the bank’s franchise value but are not direct risks that examiners can precisely measure in an examination”)).

<sup>98</sup> Office of the Comptroller of Currency, *Final Rule, Fair Access to Financial Services*, at 3 (Apr. 1, 2021).

Another feature of the Act is that, when denying service, the bank must “provide written justification to the person explaining the basis for the denial, including any specific laws or regulations the covered bank believes are being violated by the person or customer, if any.”<sup>99</sup> Congress should fortify this section by requiring the bank to point to the relevant policy and the customer’s conduct that was the basis for that decision, a copy of the terms of service including any cited policies, and whether the bank consulted with any third parties when making the determination. Eight states are currently considering legislation that includes this right to an explanation from large banks and payment processors.<sup>100</sup>

Congress also needs to increase accountability and transparency in the regulatory process. Congress should reduce the scope of what is confidential and increase public reports and consumer rights. Legislation should pare back confidential supervisory information, the bank examiner’s privilege, and similar requirements. It should also require financial institution regulators to implement policies, internal guidance, training, and reporting measures to ensure that they are proactively addressing threats to free speech and religious exercise that stem from customer cancellations or denials of service.

Another way to increase transparency is to request documents and reports that the public cannot access because of the above confidentiality requirements. Because Congress can sometimes pierce these qualified privileges, it should require financial institutions to turn over documents and answer questions about how they interpret and apply their problematic policies and respond to particular de-banking incidents. Regulators should be required to answer for their reputational risk guidance. And both should be required to turn over documents and answer questions about how they have cooperated to target things like hate speech, misinformation, or third-party reputational risk.

## **Conclusion**

Americans need to know about the risk of politicized de-banking. Many conservative and religious citizens and organizations are one disgruntled activist, employee, or regulator away from losing their bank account or payment processing. Recent incidents have shown that this is happening, that it is accelerating, and that government agencies and financial institutions are all too willing to cooperate to harm our civil liberties. We cannot live in a free country if access to the marketplace depends on our political or religious views.

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<sup>99</sup> H.R. 2743 Sec. 8(b)(1)(D).

<sup>100</sup> Tenn. H.B. 2100; Idaho H. 669; Ariz. S.B. 1167; Ga. H.B. 1205; Iowa H.F. 2409; Ky. H.B. 452; Miss. S.B. 2118; Ind. S.B. 0028.